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January 5, 2001

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

By Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: EX PARTE -- CC Docket No. 00-217, Joint Application of SBC
Communications, Inc. Pursuant to Section 271 of the Telecommunications
Act of 1996 to Provide InterLATA Services in Kansas and Oklahoma

Dear Ms. Salas:

Enclosed for filing in the above-captioned docket is the recent decision of the Arkansas Public Service Commission finding that Southwestern Bell ("SWBT") has not met the requirements of section 271 in Arkansas. The Arkansas Commission concludes that SWBT has not met the requirements of "Track A" in that state because the sole competitor that had been providing facilities-based residential service had to withdraw from the market because of SWBT's excessive prices for unbundled elements.

The message, whether from competitive local exchange carriers ("CLECs"), the Department of Justice, or the Arkansas Commission, is loud and clear: there will be no local residential competition in the many states where unbundled element prices are excessive and not cost-based. ALLTEL pulled out of Arkansas (and other CLECs did not even attempt residential entry) because the prices are prohibitive; residential UNE-P service in Oklahoma is limited to 14 customers for the same reason, while there are none in Kansas; and competitors are withdrawing from areas in Texas where local residential service is a money-losing proposition. These are but a few examples of the prospects for local competition if the incumbent local exchange carriers are not forced to lower UNE rates to competitive, cost-based levels.

WorldCom is now offering UNE-P service in five states – New York, Texas, Pennsylvania, Michigan and Illinois – where pricing in all or parts of those states allows for competitive entry. We would like to expand our entry across the country, and look forward to working with the Commission to establish competitive UNE rates to make such entry possible.

* * * * *

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In accordance with section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, an original and one copy of this Notice are being filed with your office.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith L. Seat". The signature is fluid and cursive, with the first name "Keith" and last name "Seat" clearly distinguishable.

Keith L. Seat

Enclosure

cc (w/Enc.): Jordan Goldstein, Kyle Dixon, Anna Gomez, Rebecca Beynon, Deena Shetler, Dorothy Attwood, Glenn Reynolds, Brent Olson, John Stanley, Gary Remondino, Layla Seirafi, DOJ, Eva Power, KCC, Joyce Davidson, OCC

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Filed 12/21/2000

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ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF)
SOUTHWESTERN BELL TELEPHONE)
COMPANY FOR AUTHORIZATION TO)
PROVIDE IN-REGION INTERLATA SERVICES)
PURSUANT TO SECTION 271 OF THE)
TELECOMMUNICATIONS ACT OF 1996 AND)
FOR THE APPROVAL OF THE ARKANSAS)
INTERCONNECTION AGREEMENT)

DOCKET NO. 00-211-U

CONSULTATION REPORT OF
THE ARKANSAS PUBLIC SERVICE COMMISSION
TO THE FEDERAL COMMUNICATIONS COMMISSION
PURSUANT TO 47 U.S.C. SECTION 271(D)(2)(B)

Procedural History

The federal Telecommunications Act of 1996 (1996 Act) allows a Bell operating company (BOC) to apply to the Federal Communications Commission (FCC) for authority to provide in-region interLATA telecommunications service in any BOC in-region state. Pursuant to 47 U.S.C. §271, the BOC must file a state-specific application for in-region interLATA authority for each of the states in which the BOC provides local exchange telecommunications service as an incumbent local exchange carrier (ILEC). When Southwestern Bell Telephone (SWBT) or any other BOC files an application for authority to provide in-region interLATA telecommunications service, “[t]he Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements” of 47 U.S.C. §271(c). 47 U.S.C. §271(d)(2)(B).

On July 24, 2000, SWBT filed an Application for Authorization to Provide In-Region InterLATA Services and for Approval of the Arkansas 271 Interconnection Agreement (271 Application) requesting that the Commission issue an order or report indicating the Commission's support of the §271 Application SWBT proposes to file with the FCC. With its Application, SWBT filed twenty-two (22) Affidavits of proposed witnesses and a draft of its Brief in Support of its FCC Application. As part of its Application, SWBT filed a document which SWBT designated as the Arkansas 271 Interconnection Agreement (A2A). In its 271 Application, SWBT seeks a consultation report from this Commission for submission to the FCC to verify that SWBT has complied with the fourteen (14) point checklist set out in 47 U.S.C. §271(c)(2)(B) in SWBT's provision of interconnection to competitive local exchange carriers (CLECs) and for verification that the A2A satisfies the checklist of the 1996 Act.

In SWBT's current 271 Application proceeding, AT&T Communications of the Southwest, Inc. (AT&T), WorldCom, Inc. (WorldCom), Sprint Communications, LP, e.spire Communications, Inc. f/k/a American Communication Services, Inc. (e.spire), Connect Communications Corporation (Connect) and ALLTEL Communications, Inc. (ALLTEL) were granted intervention. Pursuant to the procedural schedule established in Order No. 5 entered on August 22, 2000, a public hearing on SWBT's 271 Application was held on November 2 and 3, 2000.

The 271 Application filed by SWBT on July 24, 2000, is the second 271 Application SWBT has filed with this Commission. SWBT filed its first application for Commission review of a proposed FCC §271 filing on February 24, 1998 in Docket No. 98-048-U. The application was amended and supplemented by SWBT on April 17, 1998.

After notice and hearing on SWBT's first 271 Application, the Commission issued a Consultation Report on August 28, 1998 (First Consultation Report). In its Report, the Commission concluded that SWBT appeared to meet the requirements of eight (8) of the items on the 47 U.S.C. §271(c) checklist or, alternatively, that SWBT was in compliance with Arkansas law in providing service to CLECs on those items. The Commission reached no conclusion on two (2) of the checklist items due to pending complaints involving the same issues addressed in those checklist items. In its First Consultation Report, the Commission concluded that SWBT satisfied the checklist requirements by providing: (iii) nondiscriminatory access to poles, ducts, conduits and rights-of-way; (v) unbundling of local transport; (vi) unbundling of local switching; (viii) white pages directory listing; (ix) numbering administration; (x) access to data bases and associated signaling; (xii) local dialing parity; and (xiv) resale.

FCC Standard of Review of State Commission Consultation Report

In reviewing SWBT's proposed application to the FCC for §271 approval to provide in-region interLATA telecommunications services, this Commission's role is limited. The Commission is given the opportunity in 47 U.S.C. §271(d)(2)(B) to submit a consultation report to the FCC reflecting the status of competition in the local exchange market in Arkansas and SWBT's efforts to open its markets to competition within the state. The 1996 Act does not prescribe any standard for the FCC to use in considering a state commission's consultation report. The FCC "has discretion in each section 271 proceeding to determine the amount of weight to accord the state commission's verification. The Commission (FCC) has held that, although it will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the Commission's (FCC) role to determine whether the

factual record supports the conclusion that particular requirements of section 271 have been met.” CC DocketNo. 00-65, *In the Matter of the Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, ¶ 11(hereinafter “*SWBT Texas Order*”).

Analysis of Local Competition

47 U.S.C. §271(c)(2) SPECIFIC INTERCONNECTION REQUIREMENTS.--

(A) AGREEMENT REQUIRED.—A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought —

- (i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or
- (II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and
- (ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

A BOC meets the access and interconnection requirements of 47 U.S.C. §271(c)(2) described in 47 U.S.C. §271(c)(1)(A) by having entered into one or more binding interconnection agreements approved pursuant to 47 U.S.C. §252 by which the BOC is providing access and interconnection to a facilities-based competitor. The CLEC must be providing telephone exchange service to residential and business subscribers.

According to the General Staff of the Arkansas Public Service Commission (Staff), as of September 22, 2000, SWBT had approved interconnection agreements with 77 CLECs. Six of those CLECs are known to have facilities in Arkansas. Staff Comments at 2, 3. SWBT witness Harbin states

that as of May 31, 2000, CLECs have acquired 77,109 customer access lines in the state which amounts to approximately 7% of the one million access lines in SWBT's Arkansas serving area. Harbin Aff. at 3. The facilities-based CLECs are serving 4,619 residential and 55,041 business access lines. The 4,619 residential access lines are served by ALLTEL. No other facilities-based CLEC in the state serves any residential access lines. Staff comments at 4,5.

At this time, ALLTEL is the only facilities-based CLEC serving residential customers, and 2,025 (44%) of ALLTEL's residential customers are employees of ALLTEL. At the beginning of the public hearing herein, ALLTEL publicly announced that it would discontinue offering residential CLEC service in Arkansas on the basis of cost considerations. Existing residential customers will be able to continue ALLTEL service only at their present location. ALLTEL will no longer serve or compete in any way for new residential customers.

With ALLTEL's withdrawal from the residential CLEC market, the Commission cannot say that SWBT now meets the requirements of 47 U.S.C. 271§(c)(1)(A) that it have a facilities-based CLEC providing local exchange service to residential and business subscribers. For the present, ALLTEL has residential customers, but through attrition those numbers will steadily decline. No new customers will be added by ALLTEL and ALLTEL will not compete with SWBT for residential customers. The question which the FCC will have to answer in reviewing SWBT's §271 application is whether or not ALLTEL is a competitor of SWBT's in the residential market after ALLTEL's announcement that it has withdrawn from the residential market.

The other alternative for a 47 U.S.C. §271 is “track B,” 47 U.S.C. §271(c)(1)(B). However, as Staff correctly observed:

Consideration of SWBT’s application under 47 U.S.C. §271(c)(1)(B) would require that this Commission certify that all CLECs requesting access have failed to negotiate in good faith or failed to comply, within a reasonable period of time, with the implementation schedule contained in their interconnection agreements. Since SWBT has received requests for interconnection, has approved interconnection agreements with facilities-based providers, and the CLECs have neither failed to negotiate in good faith nor comply with their implementation schedule, its application cannot be considered using 47 U.S.C. §271(c)(1)(B). Staff Comments at 4.

Arkansas 271 Interconnection Agreement

In its Application, SWBT describes the A2A as a key component of its Application and proposed §271 filing with the FCC. According to SWBT, the A2A is an interconnection agreement which would not become available to CLECs in Arkansas “unless the Arkansas PSC finds that it satisfies the 14-point checklist of §271(c) of the Act.” 271 App. ¶ 9. SWBT contends that the A2A will enhance CLECs’ ability to compete by offering interconnection terms and conditions that have been examined in the Texas 271 process and will give “Arkansas CLECs the benefits of the lengthy collaborative process in Texas.” 271 App. ¶ 10.

Interconnection agreements are the contracts between incumbent local exchange carriers (ILECs) such as SWBT and CLECs prescribed in the 1996 Act to allow CLECs access to the ILECs network and to enable CLECs to provide telecommunications service. The 1996 Act requires that interconnection agreements be submitted to state commissions for review and approval. 47 U.S.C. §252(e)(1). Section 251 of the 1996 Act sets out the minimum requirements for interconnection between CLECs and ILECs. In Section 252, the 1996 Act provides the framework for state commission review of interconnection

agreements and arbitration of issues between the parties to the interconnection agreement. Negotiated interconnection agreements and arbitrated interconnection agreements must be submitted to a state commission for approval. Negotiated agreements may contain any terms, rates and conditions upon which the two parties involved may agree. A state commission may only reject a negotiated agreement if it finds that the agreement discriminates against a telecommunications carrier that is not a party to the agreement or that the agreement is not in the public interest. 47 U.S.C. §252(e)(2)(A). An arbitrated agreement must comply with §251 and §252(d) to be approved by a state commission. 47 U.S.C. §252(e)(2)(B).

According to SWBT, the A2A is a model agreement which has not been negotiated with any CLEC, and no CLEC in Arkansas has been offered or has accepted the A2A as an interconnection agreement. In fact, SWBT states that the A2A will not be offered to a CLEC unless the Commission finds that the A2A meets the §271 checklist “because of the quid pro quo aspects” of SWBT’s offer of the agreement. T. 104. Due to the unique nature of SWBT’s request that the Commission approve an interconnection agreement which is not a contract between two parties and which does not appear to be contemplated in the 47 U.S.C. §252(e) approval process, the Commission entered Order No. 13 on October 27, 2000, directing the parties to brief the issue of whether the Commission has the authority to approve or modify the A2A.

The position of SWBT is that the A2A is similar though not identical to the T2A which the Texas Public Utility Commission (Texas PUC) approved and, therefore, this Commission should also approve the A2A based upon the Texas PUC’s approval of the T2A. Further, SWBT contends that the fact that the A2A is not a negotiated or arbitrated agreement “does not preclude this Commission from finding that

the A2A provides CLECs in Arkansas with nondiscriminatory access to each of the “competitive checklist” items at just and reasonable rates as mandated by federal law.” SWBT A2A Brief at ¶ 4.

The Staff of the Arkansas Public Service Commission (Staff) takes the position that:

SWBT correctly notes that Congress did not expressly anticipate proposed agreements like the A2A and that there is nothing in the federal act that prohibits this sort of agreement from serving as a model agreement. Staff believes that this misses the point. The Telecommunications Act is a general grant of authority with some restrictions to state commissions. The Telecommunications Act is not generally a limitation on existing state commission authority to approve interconnection agreements. To say that the Act does not prohibit something does not answer the question of what authorizes the particular action desired. Staff A2A Brief at 2.

In responding to Order No. 13, e.spire contends that the Commission has no authority under state or federal law to approve or modify the A2A. e.spire contends that the applicable provision of state law is Ark. Code Ann. § 23-17-408(c)(5) which states that this Commission has no jurisdiction over services other than telecommunications services and that the A2A does not propose telecommunications services as defined in Ark. Code Ann. § 23-17-403(25)(A). Therefore, according to e.spire, the Commission has no authority under state law to approve or modify the A2A. AT&T and Connect agree with e.spire’s position on state law. AT&T, Connect, e.spire and Staff also assert that there is no authority under federal law for the Commission to approve or modify the A2A because the A2A is neither an interconnection agreement nor a statement of generally available terms (SGAT) under 47 U.S.C. §§ 252(b), (e), or (f). “Federal law does not authorize this Commission to entertain anything else, much less approve, disapprove, or modify it.” e.spire A2A Brief at ¶ 4. The parties also note that even if the A2A did propose telecommunications services, this Commission could not approve or modify it because, under Ark Code Ann. § 23-17-408(c)(2), rates for services do not require Commission approval. “In other words, there

is nothing the Commission can do about the A2A that could bind anybody to anything for any length of time.” e.spire A2A Brief at ¶ 5.

In its A2A Brief, Staff offered an alternative position to approving or modifying the A2A. The Staff takes the position that the Commission could issue an advisory opinion commenting on the A2A’s compliance with federal law and comparing the benefits to the terms of existing interconnection agreements. The Staff observes that the Commission’s report is only a recommendation to the FCC in compliance with 47 U.S.C. §271(d)(2)(B) and is not binding on SWBT or the FCC.

SWBT places a great deal of emphasis on the proceeding before the Texas PUC and the Texas PUC’s approval of the T2A in its Application requesting Commission review of the proposed §271 filing. SWBT appears to take the position that the Texas PUC’s proceeding was so detailed a review of SWBT’s T2A and other operations as to eliminate any need to conduct an in depth review of the A2A or checklist compliance in Arkansas. In addition, SWBT argues that the FCC Texas Order is crucial to evaluation of its Arkansas 271 Application, contending that in that order, the FCC makes it “clear that SWBT’s efforts to open its local markets to competition in Arkansas and across its five-state region meets, and in many cases, exceeds the requirements of §271.” 271 App. at ¶ 7.

The Commission acknowledges that there are certain areas of compliance with the §271 checklist which are regional in nature. As the Commission observed in the First Consultation Report, there are economies and efficiencies to regional operational support systems (OSS) and the Commission indicated its willingness to await the outcome of an ongoing review in Texas. *See First Consultation Report at 15.* However, the A2A is not regional and, as SWBT readily admits, the A2A and the T2A are not identical.

There are very significant differences between the two agreements that far exceed changing the state names used in the agreements. The differences between the T2A and A2A would have a significant impact on CLECs in Arkansas.

A major difference between the T2A and the A2A is the rates and charges. The rates in the A2A for recurring and nonrecurring charges are substantially higher than the rates available to CLECs in the T2A. ALLTEL, the only facilities-based CLEC serving residential customers in Arkansas, states that its principal concerns with the A2A are the unbundled network element (UNE) rates and nonrecurring charges. ALLTEL also expresses concerns that the rates in the A2A are not firm rates.

So a person who would opt into that or execute this A2A, even with the lower current rates that they're proposing, which are lower than Alltel's interconnection agreement rate, they're not real, because they can be trued up and, presumably SWBT would then be supporting in that cost docket the original A2A rates because those are the ones that they contended are in compliance with FCC rules, TELRIC, et cetra. And so ultimately, the true up would go against CLECs if they're successful in that docket, if this Commission had the authority to conduct such a docket, a cost docket. If it does, then certainly we would support a cost docket, because perhaps out of it, it could improve rates, and we would certainly be interested in that. T.18.

In Kansas and Oklahoma, SWBT also offered model agreements in its §271 applications with rates substantially higher than the rates in the T2A. In evaluating the Kansas and Oklahoma applications before the FCC pursuant to 47 U.S.C. §271(d)(2)(A), the United States Department of Justice (DOJ) observed that:

Both the recurring and nonrecurring charges for the use of UNEs in Oklahoma, and the nonrecurring charges for use of UNEs in Kansas, are substantially greater than the comparable charges in Texas, which the Commission (FCC) has found to be appropriately cost based. There is no obvious difference in costs between and among the states that would account for the difference in prices, and there are some indications in the record that

the prices in Kansas and Oklahoma were not determined in accordance with the Commission's methodological requirements. Moreover, competitive local exchange carriers (CLECs) have chosen to use UNEs to a very limited extent in Kansas and Oklahoma, a fact that could suggest that the prices of those UNEs are not appropriately based on cost. In these circumstances, we believe the Commission (FCC) should undertake an independent determination whether these prices conform to the requirements of the 1996 Act and the Commission's (FCC) rules, rather than relying on the decisions of the KCC and OCC to approve those prices.

In the Matter of the Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, DOJ Evaluation, December 4, 2000, at 3 (DOJ Evaluation).

In evaluating the Kansas and Oklahoma Applications, DOJ also observed that "[p]rices which are not properly cost-based act as a barrier to entry; such prices may prevent entry entirely, or limit entry in type or scale." DOJ Evaluation at 11. In support of this statement, DOJ cited "ConnectSouth Comments at 4 ("On November 2, 2000, ConnectSouth (sic) notified the Arkansas Public Service Commission that it was withdrawing from the Arkansas market due to SWBT's high collocation and UNE charges.")" Id. at footnote 41. (The Commission believes that the DOJ incorrectly used the name ConnectSouth since it was actually ALLTEL that notified the Commission that it would no longer offer service to new residential customers.)

ALLTEL is the only facilities-based CLEC in Arkansas serving residential customers at this time and it announced that it would no longer compete for any additional residential customers as of November 1, 2000, citing cost considerations as the principal reason. T. 19. ALLTEL indicated that its current residential customers in SWBT territory may retain services; however, if they move from their current location they cannot take the services with them. ALLTEL's witness cited three concerns which ALLTEL

had in trying to compete in the residential market: collocation, pricing and operational problems. According to ALLTEL, it would only consider resuming further service to the residential market if SWBT made improvements in those areas which might make it feasible for ALLTEL to consider competing in the residential market again. T. 401-402.

The Commission has reviewed the DOJ's evaluation of the Kansas and Oklahoma agreements which notes the differences between the T2A and the Kansas and Oklahoma agreements submitted to the FCC and the DOJ's conclusion that those differences may not conform to the 1996 Act. SWBT has represented that the rates and charges in the A2A are comparable to the rates and charges in the Kansas and Oklahoma agreements--- the same rates and charges which DOJ concludes are probably not in conformance with the 1996 Act. Based upon the DOJ's unfavorable evaluation of the comparable agreements from Kansas and Oklahoma and the comments and testimony herein, the Commission is not persuaded that the A2A as presented by SWBT can be considered to be in compliance with all the checklist items in 47 U.S.C. §271(c). From the DOJ's Evaluation of the Kansas and Oklahoma agreements, it appears probable that the A2A would not be found by the DOJ to be in compliance with the checklist if SWBT files a §271 application for Arkansas with the FCC. However, if SWBT amended the A2A to eliminate the differences between the A2A and the T2A and to make available the same terms, conditions and rates in the T2A in a legally binding agreement to be offered to Arkansas CLECs, the Commission would approve the A2A as in compliance with the checklist in 47 U.S.C. §271(c) to the extent that the Commission has the legal authority to do so under state and federal law.

47 U.S.C. §271(c)(2)(B), Competitive Checklist

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

Section 251(c)(2) requires that interconnection be provided that is equal in quality to that provided by the local exchange carrier to itself or to any subsidiary or affiliate for the transmission and routing of telephone exchange service and exchange access at technically feasible points. Section 252(d)(1) requires that a state commission determine the just and reasonable rates for interconnection of facilities and equipment for network elements, be cost-based, and that rates be non-discriminatory. This section also requires reciprocal compensation and wholesale prices which are based on the retail rates less cost associated with marketing, billing, collection, or other avoided costs.

SWBT witness Deere testified that SWBT provides requesting CLECs with non-discriminatory access to UNEs at technically feasible points in conformance with the FCC's rules. SWBT witness Deere states that the A2A, together with Commission approved interconnection agreements, establishes several methods of interconnection arrangements available at the line side or trunk side of the local switch, the trunk connection points of a tandem switch, central office cross-connect point, out-of-band signaling transfer points, and points of access to UNEs. Deere Aff. at ¶ 18, ¶ 24. The witness also testified that CLECs may request custom interconnection arrangements which allow CLECs to modify existing interconnection arrangements and create additional arrangements. Deere Aff. at ¶ 33, ¶¶ 84-87.

The rates for physical collocation which SWBT proposes in its A2A have not previously been negotiated with any CLEC or reviewed or approved by this Commission or any other commission. T. 59. The A2A rates, terms and conditions are not consistent with those contained in the Texas collocation tariffs that were approved by the FCC in the SWBT Texas 271 order. To arrive at the proposed A2A UNE rates, SWBT applied certain adjustments, which the Texas PUC ordered to be made to the T2A, to SWBT's Arkansas cost studies. T. 190 and Joint Sparks, Allis Dysart, Rogers Affidavit paragraph 26. SWBT did not make all of the adjustments in Arkansas that were required in Texas; for instance, it did not include any Texas rulings or adjustments that related to rates rather than costs. T. 192-96. The A2A rates proposed by SWBT, even as modified in SWBT's rebuttal testimony, remain substantially higher than the T2A rates, and the record does not reflect that SWBT has justified these substantially higher rates.

Under this checklist item, SWBT must be offering interconnection in accordance with 47 U.S.C. §271(d)(1) which requires that SWBT provide interconnection to CLECs at cost based rates. SWBT has offered the A2A as in compliance with the entire checklist, and SWBT has represented that the rates in the A2A are similar to the rates offered in the Kansas and Oklahoma agreements. However, these are the same rates which the DOJ found to be substantially different from the rates in the T2A and are the rates which the DOJ suggested the FCC investigate as not being cost based or in compliance with the 1996 Act. DOJ Evaluation. Accordingly, based upon the DOJ's Evaluation and SWBT's representation of the similarities with the Kansas and Oklahoma agreements, this Commission cannot conclude that SWBT is in compliance with this checklist item. *(ii) Nondiscriminatory access to network elements in accordance with the*

*requirements of
sections 251(c)(3) and
252(d)(1) of this title.*

As noted under the previous checklist item, SWBT's witnesses testified as to the UNE elements and interconnection points available in the A2A. As this Commission noted in its First Consultation Report, Section 251(c)(3) requires SWBT to provide nondiscriminatory access to UNEs at technically feasible points, on rates, terms and conditions which are just and reasonable, and to provide those elements in a manner which allows a CLEC to combine the UNEs to provide telecommunications services. SWBT's provision of OSS is included under this checklist item. OSS is not a specific checklist item, but the provision of this service impacts SWBT's compliance with multiple checklist items.

The parties appear to agree that SWBT provides the required UNEs. The point of contention arises as to whether SWBT provides these UNEs at technically feasible points which are equal in quality to that which SWBT provides itself or an affiliate, and whether the rates terms and conditions for providing the UNEs are just, reasonable and nondiscriminatory.

As initially proposed, the A2A would have required a CLEC to establish a physical point of interconnection with SWBT's network in each local exchange area. Turner at 20-34. In rebuttal to AT&T's witness, SWBT proposed to add Section 1.3 to A2A attachment 11, which provides a CLEC the option of using a single point of interconnection or multiple points of interconnection throughout a local access transport area (LATA). Sparks Rebuttal Aff. at ¶ 28. AT&T contends that this section would require a CLEC using a single point of interconnection to bare all costs of transport on SWBT's side of the point of interconnection. AT&T also asserts that the A2A would require a CLEC to extend its transport

using transport from a third party or SWBT. According to AT&T, the economic effect is the same as requiring the CLEC to establish a physical point of interconnection in each local exchange area. *See* AT&T Communications of the Southwest, Inc.'s Findings of Fact and Conclusions of Law at 7.

SWBT asserts that it has complied with the requirement to provide interconnection at technically feasible points and argues that the rates are reasonable and nondiscriminatory. SWBT also states that the provisions complained of by AT&T were negotiated and arbitrated between AT&T and SWBT in Texas, and that the FCC found "AT&T's experience does not constitute evidence of a failure by SWBT to provide interconnection at all technically feasible points for purposes of section 271 review." *Deere Rebuttal Aff.* at ¶¶ 32-33, referencing *Texas Order* at ¶ 77.

A determination of whether SWBT provides the required network elements in equal quality to that which it provides to itself or an affiliate rests largely on the performance measurements relating to the OSS functions. As stated by the FCC:

Section 271 requires the Commission to determine whether a BOC offers nondiscriminatory access to OSS functions. Section 271(c)(2)(B)(ii) requires a BOC to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(1)(c)(3) and 252(d)(1)." The Commission has determined that access to OSS functions falls squarely within an incumbent LEC's duty under Section 251(c)(3) to provide unbundled network elements under terms and conditions that are nondiscriminatory and just and reasonable, and its duty under Section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable. The Commission must therefore examine a BOC's OSS performance to evaluate compliance with Section 271(c)(2)(B)(ii) and (xxib). In addition, the Commission has also concluded that the duty to provide nondiscriminatory access to OSS functions is embodied in other terms of the competitive checklist as well. *Texas Order* at ¶ 93.

AT&T's arguments regarding the technically feasible points of interconnection are essentially the same arguments that AT&T made in opposition to SWBT's 271(b) application in Texas. SWBT appears to comply with the requirement that it offer CLECs interconnection at technically feasible points. SWBT has demonstrated that it has approved interconnection agreements which provide CLECs with a process for requesting interconnection at additional, technically feasible points.

SWBT's OSS functions employed in Arkansas are the same as those employed across SWBT's region. Staff Comments at 14. SWBT reports most of its performance measurements on a state-specific basis, and the third party testing of SWBT's systems conducted by Telcordia pursuant to the directives of the Texas Commission provides evidence of the capabilities of SWBT's OSS functions. Because SWBT's OSS functions are the same throughout its regions, the findings of the Texas Commission should be equally valid in Arkansas. Additionally, SWBT's training materials and local service support center provide an ongoing support for CLECs in accessing and dealing with SWBT's OSS.

With regard to the collocation issue, ALLTEL witness Weeks testified that:

... SWBT proposes reserving space for transport equipment for the current year, plus two (2) years. SWBT also proposes reserving space for switching, power and Main Distribution Frame ("MDF") for the current year plus ten (10) years and for a Digital Cross Connect System ("DCS") for the current year plus ten (10) years for anticipated growth. While SWBT is entitled to reserve space for reasonable and anticipated growth, the proposed time frames are excessive. SWBT offers no justification why space reservation intervals in Arkansas should be extended beyond those already established in Texas. Alltel proposes to use the T2A maximum reservation times. Weeks Testimony at 8.

In response, SWBT's witness contends that the space reservation intervals in the A2A "are the same space reservation intervals that CLECs and SWBT stipulated to in the Kansas Collocation Tariff Agreement and approved by the Kansas Commission on June 14, 2000. In addition, the CLEC coalition in Missouri also

agreed with these intervals. SWBT's proposal is the only proposal with space reservation intervals agreed to by both CLECs and SWBT." Matthew Adam Rebuttal Aff. at 5. SWBT contends that ALLTEL fails to offer any evidence why the Texas reservation intervals are superior to the ones proposed by SWBT in the A2A and that ALLTEL's preference for the reservation requirements contained in the T2A is clearly based on the fact that those reservation requirements are more favorable to CLECs.

SWBT has presented the A2A as a "negotiated agreement" which this Commission is free to accept under Section 252 of the Federal Act; however, SWBT has clearly used a pick and choose approach from agreements other than the T2A in order to fashion an agreement, the entirety of which has not been negotiated, which is composed of parts of various agreements that are favored by SWBT. SWBT has provided no justification for the failure to include within the A2A the same reservation intervals which are in the T2A, and accordingly the Commission cannot conclude that the A2A as offered is in compliance with the checklist.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

This item was approved in the Commission's First Consultation Report and there is no evidence which suggests that SWBT is not currently providing nondiscriminatory access to the poles, ducts, conduits and rights-of-way. See SWBT's first affidavit.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

In the Commission's First Consultation Report, the Commission stated that SWBT's interconnection agreements appear to make local loops available as UNEs; however, as AT&T's testimony reflects, SWBT

is not in compliance with the FCC's *First Report and Order* with regard to Digital Subscriber Line (DSL) unbundling. The Commission cannot conclude from the record that SWBT has met this checklist item. First Consultation Report at 19.

In this proceeding, ALLTEL asserts that SWBT fails to provide nondiscriminatory access to DSL capable loops as a result of inaccuracies or incomplete information in SWBT's data bases. Weeks Testimony at 10-11. ALLTEL suggests that SWBT should agree to amend its interconnection agreements to include escalation provisions and penalties when due dates for the provisioning of DSL service are missed. ALLTEL Proposed Findings of Fact, Conclusion of Law and Modified A2A at 2. ALLTEL witness York stated that ALLTEL has "had a very, very hard time getting ADSL service provisioned in an acceptable amount of time for our customers, which has caused us to lose several of them." T. 394.

The testimony of SWBT's witness Welch reflects that SWBT required ALLTEL to go through a burdensome process in pre-ordering DSL conditioned loops. T. 225-239. ALLTEL suggests, and the record reflects, that SWBT is not providing nondiscriminatory access to data which would reflect whether a loop is DSL conditioned. SWBT responds by stating that it is offering ALLTEL the opportunity to participate in expansion of SWBT's "yellow zone" line sharing trial which would eliminate the need for loop qualification and dramatically reduce the provisioning intervals from those contained in the current SWBT/ALLTEL interconnection agreement. Welch Rebuttal Aff. at ¶ 22. The yellow zone trial may prove to eliminate the concerns regarding provisioning DSL conditioned loops; however, the Commission cannot conclude from the record that SWBT has met this checklist item.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

This Commission's First Consultation Report found that SWBT offers local transport unbundled from switching or other services. *See* First Consultation Report at 20-21. Additionally, SWBT offers shared or common transport between its central office switches, between its tandem switches, and between tandem switches and central office switches in accordance with the shared transport requirements of the FCC's UNE remand order. *See* Sparks Aff. at ¶ 101, and Deere Aff. at ¶ 110. Accordingly, this Commission finds for purposes of this Consultation Report that SWBT continues to meet this checklist item.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

This Commission's First Consultation Report found that SWBT was providing unbundled local switching, and the evidence of record in this proceeding clearly suggests that SWBT continues to do so. *See* Sparks Aff. at ¶¶ 102-140.

(vii) Nondiscriminatory access to -(I) 911 and E911 services; (II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and (III) operator call completion services.

No CLEC has alleged that SWBT fails to provide access to 911 and E911 services. Although this Commission's First Consultation Report indicated that this Commission could not conclude that SWBT had met this requirement, the record now clearly reveals that SWBT is meeting the requirements.

The FCC UNE remand order has removed directory assistance and operator services from the list of elements required under checklist Item 7. *See* UNE Remand Order, 15 FCC Rcd at ¶¶ 441-442. Accordingly, the Commission concludes that SWBT has shown compliance with checklist Item 7.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

This Commission's First Consultation Report found that SWBT appears to in compliance with this checklist item. Although some CLECS have complaints regarding the accuracy of the white pages listings and the frequency of updates for those listings, these problems can, at least in part, be attributed to difficulties inputting correct information into the data bases, such that a certain amount of inaccuracy is, unfortunately, to be expected. The Commission does not believe that the complaint concerning SWBT's provision of white page listings is such that it indicates that SWBT does not provide white page directory listings to customers of other carriers. Accordingly, the Commission continues to believe that SWBT is in compliance with this checklist item.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

In its First Consultation Report, this Commission found that SWBT provides nondiscriminatory access to telephone numbers. In this proceeding, the record reflects that SWBT has assigned numbers in accordance with industry established guidelines published by the industry numbering committee and continues to provide nondiscriminatory access to telephone numbers. *See* Adair Aff. at ¶¶ 10-18.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

The Commission's First Consultation Report found SWBT to be in compliance with this checklist item. WorldCom has proposed that SWBT be required to make the contents of its Calling Name Database (CNAM) available to CLECs on a bulk basis. The information contained in the CNAM

database is available to CLEC's end office switches on a query-by-query basis, just as that information is available to SWBT's end office switches. *See* Rogers Rebuttal Testimony at ¶ 10.

We do not believe that the complaints of WorldCom support a conclusion that SWBT has failed to provide nondiscriminatory access to databases and associated signaling for call routing and completion. Accordingly, the Commission finds that SWBT continues to be in compliance with checklist Item 10.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

SWBT has equipped eighty-one percent of its access lines in Arkansas with local number portability (LNP). CLECs in Arkansas serve more than 70,000 ported access lines. *Orozco Aff.* at ¶ 26. Although some problems continue to exist regarding LNP, (see Willard Testimony at 60-61 and Dysart Rebuttal Testimony), SWBT generally meets the performance benchmark related to LNP and also provides two forms of INP, remote call forwarding and direct inward dialing. The evidence indicates that SWBT provides number portability on reasonable terms and conditions.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

This Commission's First Consultation Report approved SWBT's provision of local dialing parity. No CLEC has presented any evidence questioning SWBT's ability to provide the necessary access to allow local dialing parity, and this Commission continues to believe that SWBT complies with this checklist item.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

Since the issuance of the Commission's First Consultation Report, the FCC has indicated that it will not take into account a Bell operating company's failure to pay reciprocal compensation for Internet traffic in evaluating checklist compliance. Texas Order at ¶ 386. Although some CLECs have complained that the issue of reciprocal compensation payments for Internet traffic remains unresolved, the Commission is of the opinion that, based on the FCC's Texas Order, the issue of whether Internet traffic is subject to reciprocal compensation does not affect the issue of whether SWBT is providing reciprocal compensation arrangements in accordance with section 252(d)(2) of the Federal Act. Accordingly, based on the testimony provided, the Commission finds that SWBT is in compliance with this checklist item.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

This Commission's First Consultation Report found that SWBT was making its telecommunications services available for resale. There are several resellers of service in Arkansas and SWBT has proposed a wholesale discount rate of 18.26%. See Lundy Aff. at ¶ 35, and Sparks Aff. at ¶¶ 121-123. The Commission believes that SWBT continues to comply with this checklist item.

Furthermore, the Commission believes that it is not necessary for the Commission to conduct an independent review of SWBT's performance data. The regional processes for collecting and reporting data were validated by Telcordia and were accepted by the FCC.

Conclusion

The Commission finds that SWBT has made significant progress in providing service to CLECs in compliance with the checklist since SWBT's first 271 application was filed in 1998. However, with SWBT's only facilities-based residential competitor, ALLTEL, having withdrawn from the residential service market, it does not appear that SWBT complies with the requirement that it be "providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service to residential and business subscribers." 47 U.S.C. §271(c)(1)(A). To apply to the FCC for 271 approval to provide interLATA telecommunications service, SWBT must meet the requirements of 47 U.S.C. §271(c)(1)(A), as well as provide service to CLECs in compliance with the checklist. 47 U.S.C. §271(c)(2)(A) and (B). Further, the Commission cannot conclude that SWBT's utilization of the A2A as presently proposed would put SWBT in compliance with all the checklist items in 47 U.S.C. §271(c)(2)(B).

However, with that said, if SWBT were to modify its proposed A2A to offer Arkansas CLECs the same terms, conditions, and rates that are available in the Texas T2A, the Commission would approve the A2A as complying with the checklist items in 47 U.S.C. §271(c)(2)(B) to the extent of the Commission's authority. Although these revisions may not in and of themselves alter ALLTEL's decision to withdraw from the residential market, the Commission fervently hopes that they will provide sufficient incentive for some facilities-based CLECs to compete in the residential market in Arkansas.

The Commission understands that the entry or exit from any telecommunications market is an independent business decision that is based upon numerous factors, but the testimony of record in this proceeding has highlighted the critical importance of the UNE rates and non-recurring charges as a

fundamental element of a competitor's decision to enter or abandon the market. Accordingly, the Commission is hopeful that the prospect of the Texas T2A rates, terms and conditions being made available in Arkansas would make a positive contribution to the reinstitution of, or creation of, new competition in the residential telecommunications market in Arkansas.

Submitted this _____ day of December, 2000.

/s/ Sandra L. Hochstetter

Sandra L. Hochstetter, Chairman

/s/ Sam I. Bratton, Jr.

Sam I. Bratton, Jr., Commissioner

/s/ Betty C. Dickey

Betty C. Dickey, Commissioner

/s/ Diana Wilson Vaughn

Diana Wilson Vaughn
Secretary of the Commission